Yong Ah Kew @ Yong Siew Mui v Cargill Feed Sdn Bhd

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–41 OF 2001
LOW HOP BING J
5 JULY 2005

Civil Procedure — Appeal — Appeal against decision of sessions court — Whether appeal had merits to justify appellate interference

The defendant had appealed against the decision of the learned sessions court judge who after a full trial had on 6 July 2001 given judgment in favour of the plaintiff in the sum of RM113,526.69 together with interest at 8% pa from the date of judgment to the date of realisation, and costs. The facts of this case was in relation to a cause of action based on goods sold and delivered by the plaintiff to the defendant. After hearing witnesses and considering documentary evidence tendered by the plaintiff and in the absence of any evidence from the defendant, the trial judge found that there were business transactions between the plaintiff and the defendant for the supply of animal feed by the plaintiff to the defendant at the defendant's request. The defendant had a running account with the plaintiff, wherein the outstanding sum due by the defendant to the plaintiff was RM113,526.69. Delivery orders, invoices and monthly statements of account had been rendered by the plaintiff to the defendant pursuant to the running account, to which the defendant had made some payments in the course of the business transactions between them. Counsel for the defendant submitted that there was no case for the defendant to answer as the defendant had never ordered or bought the goods from the plaintiff. As such, the plaintiff's notice of demand to the defendant was void and that there was no business transaction between the plaintiff and the defendant. Counsel for the plaintiff responded that the plaintiff's case had been proved.

Held, dismissing the appeal with costs:

(1) The submission for the defence was nevertheless a sham brought about by a figment of imagination which was not supported by any substantive evidence, and was indeed an afterthought hatched for the purpose of denying the outstanding sum to the rightful supplier of goods (see para 9).

(2) There could be no doubt that the evidence before the trial court clearly showed that the plaintiff had discharged the burden of proof on a balance of probabilities in accordance with s 101 of the Evidence Act 1950 (see para 10).

(3) The finding of facts by the trial judge was correct, being fully supported by the plaintiff's unchallenged oral testimony and documentary evidence adduced in the court below (see para 11).

(4) There were no merits in this appeal nor any error to justify an appellate interference (see para 12).

[**Bahasa Malaysia summary**

Defendan telah merayu terhadap keputusan hakim mahkamah sesyen yang selepas perbicaraan penuh telah pada 6 Julai 2001 memberikan penghakiman yang berpihak kepada plaintiff untuk jumlah RM113,526.69 bersama faedah pada kadar 8% setahun dari tarikh penghakiman sehingga tarikh penyelesaian, dan kos. Fakta-fakta kes ini adalah berkaitan dengan satu kausa tindakan berkenaan barang-barang dijual dan dihantar serah oleh plaintif kepada defendan. Setelah mendengar saksi-saksi dan mempertimbangkan keterangan dokumentari yang dikemukakan oleh plaintif tanpa apa-apa keterangan daripada pihak defendan, hakim di dalam perbicaraan tersebut telah mendapati bahawa terdapat transaksi perniagaan di antara plaintif dan defendan untuk pembekalan makanan haiwan oleh plaintif kepada defendan, di atas permintaan defendan. Defendan mempunyai satu akaun yang tersedia dengan plaintif, dimana jumlah tertunggak yang perlu dibayar oleh defendan kepada plaintif adalah RM113,526.69. Perintah-perintah penghantaran, invois-invois dan penyata bulanan akaun tersebut telah dikemukakan oleh plaintif kepada defendan menurut akaun yang tersedia tersebut, di mana defendan telah membuat beberapa bayaran di dalam perjalanan transaksi perniagaan di antara mereka. Peguam defendan telah berhujah bahawa tidak ada kes untuk dijawab oleh defendan memandangkan defendan tidak pernah memesan atau membeli barang-barang tersebut daripada plaintif. Oleh yang demikian, notis tuntutan plaintif kepada defendan adalah tidak sah dan tidak ada apa-apa transaksi perniagaan di antara plaintif dan defendan. Peguam plaintif pula telah membalas bahawa kes plaintif telah pun dibuktikan.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Penghujahan untuk pembelaan hanyalah satu penipuan yang berasal daripada daya imaginasi, yang tidak disokong oleh apa-apa keterangan yang substantif, dan ianya adalah satu pemikiran semula yang dilahirkan untuk tujuan menafikan jumlah yang tertunggak kepada pembekal barangan yang sah (lihat perenggan 9).

(2) Tidak ada apa-apa keraguan bahawa keterangan yang dikemukakan kepada mahkamah perbicaraan dengan jelasnya menunjukkan bahawa plaintif telah melepaskan beban pembuktian di atas imbangan kebarangkalian menurut s 101 Akta Keterangan 1950 (lihat perenggan 10).

(3) Keputusan fakta oleh hakim perbicaraan adalah betul, yang disokong sepenuhnya oleh keterangan lisan dan dokumentari yang dikemukakan oleh plaintif, yang tidak dicabar di mahkamah bawah (lihat perenggan 11).

(4) Tidak ada apa-apa merit di dalam rayuan ini atau sebarang kesilapan untuk membenarkan campurtangan mahkamah rayuan (lihat perenggan 12).]

Notes

For cases on appeal, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 582–1378.

Cases referred to

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd)

Legislation referred to

Evidence Act 1950 s 101

Appeal from: Summons No 52–1712 of 1998 (Sessions Court, Melaka)

Anthony Chua (HS Lee Chua & Partners) for the defendant.
Khairil Aznan (Andrew TS Goh &Khairil) for the plaintiff.

Low Hop Bing J:

I Appeal

[1] This is an appeal by the appellant defendant ('the defendant') against the decision of the learned sessions court judge ('the trial judge') who after a full trial had on 6 July 2001 given judgment in favour of the respondent-plaintiff ('the plaintiff') in the sum of RM113,526.69 together with interest at 8%pa from the date of judgment to the date of realisation, and costs.

II Finding of Facts

[2] The simple and straightforward facts are in relation to a cause of action based on goods sold and delivered by the plaintiff to the defendant.

[3] After hearing witnesses and considering documentary evidence tendered by the plaintiff and the absence of any evidence from the defendant, the trial judge found that there were business transactions between the plaintiff and the defendant for the supply of animal feed by the plaintiff to the defendant at the defendant's request. The defendant had a running account with the plaintiff, wherein the outstanding sum due by the defendant to the plaintiff was RM113,526.69. Delivery orders, invoices and monthly statements of account have been rendered by the plaintiff to the defendant pursuant to the running account, to which the defendant had made some payments in the course of the business transactions between them.

III MERITS OF APPEAL

[4] It was submitted by Mr Anthony Chua for the defendant that there was no case for the defendant to answer as the defendant had never ordered or bought the goods from the plaintiff and so the plaintiff's notice of demand to the defendant was void and that there was no business transaction between the plaintiff and the defendant.

[5] Mr Khairil Aznan responded that the plaintiff's case has been proved.

[6] Upon a proper perusal of the appeal record, I find that although the statement of defence had pleaded that the defendant had never ordered the goods from the plaintiff, it seems utterly incredible for the defendant not to have taken the first opportunity of disputing the plaintiff's notice of demand dated 24 June 1998 issued by the plaintiff's solicitors to the defendant by way of registered post and certificate of posting.

[7] It appears bizarre to me that it had taken the defendant and the defendant's learned counsel some three years, from 1998 to 2001 when the plaintiff filed this claim in the court below, and now in this appeal, some seven years later, to submit that the defendant has never ordered the goods from the plaintiff.

[8] The defence submission has referred to all the delivery orders, invoices and statements of account rendered by the plaintiff to the defendant. The defendant through his counsel from the Bar table and without adducing any evidence at the trial attempted to prove that these documents contained incorrect particulars. If there had really been no business transactions between the plaintiff and the defendant, there would have been no necessity whatsoever for the defendant to refer to these documents. The defendant's attempt herein proves the fallacy of the defence.

[9] Although the submission for the defence may well be a reflection of the learned counsel's competent best, in my view, it is nevertheless a sham brought about by a figment of imagination which is not supported by any substantive evidence, and is indeed an afterthought hatched for the purpose of denying the outstanding sum to the rightful supplier of goods.

[10] There can be no doubt that the evidence before the trial court clearly shows that the plaintiff has discharged the burden of proof on a balance of probabilities in accordance with s 101 of the Evidence Act 1950 which reads as follows:

> 101. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

See also *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd*[1995] 4 MLJ 673.

[11] In my view, the finding of facts by the trial judge is correct, being fully supported by the plaintiffs unchallenged oral testimony and documentary evidence adduced in the court below.

[12] Having regard to the entire appeal record and the grounds of decision of the trial judge, I am unable to find any merits in this appeal nor identify any error to justify an appellate interference.

IV CONCLUSION

[13] The decision of the trial judge is hereby affirmed and this appeal is dismissed with costs.

Defendant's appeal dismissed with costs.

Reported by Eugene Louis